

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(PJC)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION
TO "DEFENDANTS' JOINT MOTION FOR SUMMARY
JUDGMENT ON PLAINTIFF'S RCRA CLAIM (COUNT 3) [DKT #2050]"**

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Plaintiff, the State of Oklahoma ("the State"), respectfully requests that "Defendants' Joint Motion for Summary Judgment on Plaintiff's RCRA Claim (Count 3) [DKT #2050]" ("Defendants' Motion" or "Motion") be denied in its entirety.

I. Introductory Statement

Defendants seek summary judgment on the State's RCRA claim, arguing that (1) poultry waste is not a "solid waste," (2) Defendants are not "contributors," and (3) the State cannot show that (a) bacteria from poultry waste or (b) the disinfection by-products ("DBPs") resulting from the removal of poultry waste-induced algae growths in the water treatment process may present an "endangerment." Each of Defendants' arguments fails.

First, poultry waste fits squarely within the statutory definition of "solid waste." Poultry waste has no further role in the poultry growing process. It is not "destined for beneficial reuse or recycling in a continuous process by the generating industry itself," and is therefore "part of the waste disposal problem." Moreover, because RCRA endangerment claims look to the broader statutory definition of solid waste and not to narrower regulatory definitions and interpretations, Defendants' reliance on EPA regulatory materials is wholly unavailing.

Second, Defendants' conduct and business model leads to Defendants fitting squarely within the scope of "contributor" liability under RCRA. "Contributor" liability does not require proof of "control" over the handling and disposal of the poultry waste (although such control does in fact exist). Rather, the State merely needs to satisfy a far more lenient standard -- that Defendants "have a part or share in producing" the circumstances under and manner in which poultry waste is handled and disposed of in the IRW. This the State can indisputably show.

And third, not only the State's experts, but also federal and state agencies, have concluded that bacteria from poultry waste is polluting the waters of the IRW. This bacteria

contributes to violations of water quality standards, which are *per se* an endangerment to human health. Likewise, the State has compelling admissible evidence showing that the DBPs in drinking water that result from the disposal of poultry waste in the IRW may present an endangerment to human health.¹

II. Disputed Material Facts

1. Disputed. Many contract growers in the IRW are corporate entities. *See, e.g.*, Ex. 1 (collective exhibit reflecting corporate entities as contract growers) (to be filed under seal). Moreover, to the extent that Defendants are asserting by this disputed fact, and the disputed facts that follow, that the contract growers are independent, that assertion is disputed. Defendants exercise control over their contract growers and all essential aspects of poultry production. *See* Ex. 2 (Taylor P.I. Test., pp. 929-35, 940-44); Ex. 3 (2001 Atty. Gen. Op. 17, ¶ 11). Defendants own the birds, *see* DKT #1236 (at ¶ 37); DKT #1237 (at ¶ 37); DKT #1238 (at ¶ 37) ("usually retain title"); DKT #1239 (at ¶ 37); DKT #1241 (at ¶ 37); DKT #1243 (at ¶ 37); own and supply the feed the birds eat, *see* Ex. 4 (Storm Dep., pp. 47-48); Ex. 5 (McClure Dep., pp. 135-36); Ex. 6 (Maupin Dep., pp. 142-43); Ex. 7 (Butler Dep., p. 16); Ex. 8 (Houtchens Dep., pp. 147-48);

¹ With respect to their DBP by-product argument, Defendants *do not* challenge the fact that phosphorus and total organic carbon from the run-off and leaching of poultry waste in the IRW are responsible for the algae that leads to the creation of the DBPs that are at issue. Indeed, while they purport to seek summary judgment on the *entirety* of the State's RCRA claim, *see* Motion, pp. 1 & 25, Defendants' Motion addresses *only* two parts of the endangerment-to-human-health aspect of the State's RCRA claim -- those human health endangerments from bacteria and DBPs -- ignoring the human health endangerments from blue-green algae. Moreover, Defendants' Motion does not address at all the endangerment-to-the-environment-from-phosphorus aspect of the State's RCRA claim. (That aspect of the State's RCRA claim is fully addressed in the State's Motion for Partial Summary Judgment, *see* DKT #2062, and to the extent necessary is incorporated by reference.) In short, although Defendants purport to move on the entirety of the State's RCRA claim, they in fact have not. Thus, the endangerment-to-human-health aspect of the State's RCRA claim relating to cyanobacteria (blue-green algae), as well as the endangerment-to-the-environment-from-phosphorus aspect of the State's RCRA claim, are not before the Court and should not be considered in connection with Defendants' Motion.

Ex. 9 (Murphy Dep., p. 141); Ex. 10 (Pilkington Dep., pp. 49-50); Ex. 11 (Schaffer Dep., p. 14); decide when the birds are delivered, *see* Ex. 12 (Dicks Dep., p. 116); Ex. 5 (McClure Dep., p. 134); Ex. 13 (Schwabe Dep., p. 47); Ex. 14 (Wear Dep., pp. 26-27); Ex. 9 (Murphy Dep., pp. 140-41); Ex. 10 (Pilkington Dep., p. 49); decide the number of birds delivered, *see* Ex. 12 (Dicks Dep., p. 116); Ex. 15 (Alsup Dep., p. 261); Ex. 14 (Wear Dep., p. 26); regularly inspect and supervise the growing operations, *see* Ex. 12 (Dicks Dep., pp. 118-9); Ex. 4 (Storm Dep., pp. 60-61); Ex. 16 (Alsup Dep., pp. 29-31 & 35); Ex. 6 (Maupin Dep., pp. 150-52); Ex. 5 (McClure Dep., pp. 136-140); Ex. 7 (Butler Dep., pp. 21-22); Ex. 17 (Mullikin Dep., pp. 46-48); Ex. 9 (Murphy Dep., pp. 132 & 142); Ex. 18 (Reed Dep., pp. 50-52); Ex. 10 (Pilkington Dep., p. 50); Ex. 19 (Pigeon Dep., pp. 65-68); dictate where growing operations are located, *see* Ex. 12 (Dicks Dep., p. 115); Ex. 16 (Alsup Dep., p. 58); Ex. 5 (McClure Dep., p. 176); Ex. 8 (Houtchens Dep., p. 30); Ex. 9 (Murphy Dep., p. 171); Ex. 20 (Tyson website); and specify poultry house clean-outs / cake-outs, *see* Ex. 16 (Alsup Dep., pp. 45-48, 52-53); Ex. 7 (Butler Dep., p. 25); Ex. 21 (Williams Dep., 14-15); Ex. 19 (Pigeon Dep., p. 75); Ex. 9 (Murphy Dep., p. 199); Ex. 22 (at TSN0039CORP); Ex. 23 (at TSN0138CORP); Ex. 24 (at TSN0273CORP); Ex. 25 (at PFIRWP-000604) (to be filed under seal); Ex. 26 (at CARTP000391-392) (to be filed under seal); Ex. 27 (at GE-HB 0024); Ex. 28 (collective exhibit of George's, Tyson, Peterson & Simmons flock service reports specifying clean outs / cake outs). The flock-to-flock structure of the grower contracts underscores Defendants' control, as Defendants can decline to deliver new birds to a grower. *See* Ex. 2 (Taylor P.I. Test., pp. 933-35). Defendants' contracts with the growers are generally non-negotiable. *See* Ex. 2 (Taylor P.I. Test., p. 940); Ex. 4 (Storm Dep., p. 55); Ex. 6 (Maupin Dep., p. 21); Ex. 21 (Williams Dep., p. 14); Ex. 5 (McClure Dep., p. 133); Ex. 14 (Wear Dep., pp. 39 & 56); Ex. 9 (Murphy Dep., p. 230); Ex. 10 (Pilkington Dep., p. 21). In sum,

Defendants have oligopsony power over the growers. *See* Ex. 2 (Taylor P.I. Test., pp. 941-43); Ex. 29 (Taylor Dep., p. 29). Defendants' grower contracts, with the exception of Peterson's since 1999 and Simmons' since 2008, do not transfer ownership of the poultry waste to the growers. *See* Resp. to Facts, ¶ 15. However, Peterson's and Simmons' contracts with their growers are non-negotiable -- even as to responsibility for poultry waste. *See* Resp. to Facts, ¶ 15. And, as shown by the *City of Tulsa* settlement, Defendants can control the growers and the disposal of the poultry waste. *See* Ex. 30 (Tolbert P.I. Test., pp. 94-95); Ex. 31 (at pp. 8-9).

2. Disputed. Poultry at Defendants' own operations in the IRW are raised in houses with equipment owned by those Defendants. *See, e.g.*, Ex. 32 (Patrick Dep., pp. 36-38).

3. Disputed. Some Defendants provide the bedding material used by their contract growers. *See, e.g.*, Defs.' MSJ Ex. 3 (at TSN59500SOK); Defs.' MSJ Ex. 8 (at CARTP172228).

4. Disputed. Poultry litter, also known as poultry waste, consists of poultry excrement, poultry carcasses, feed wastes or any other waste associated with the confinement of poultry from a poultry feeding operation. *See* 2 Okla. Stat. § 10-9.1(B)(21). Poultry waste contains large amounts of phosphorus. *See* Ex. 33 (at p. 3); Ex. 34 (at PIGEON.0643). It also contains the pathogenic bacteria *E. coli*, *Salmonella* and *Campylobacter*, *see* Ex. 35 (Teaf P.I. Test., pp. 205 & 207); Ex. 36 (Lawrence P.I. Test., pp. 1169-70); Ex. 37 (Harwood P.I. Test., p. 642), which can cause illness in humans. *See* Ex. 36 (Lawrence P.I. Test., p. 1193); Ex. 37 (Harwood P.I. Test., p. 640); Ex. 38 (State's P.I. Exhibit 404).

5. Disputed.² Poultry waste is not well-balanced in nutrients and is not a good

² Defendants have attached an excerpt of Dr. Clay's unsworn expert report in support of this proposition. Unsworn expert reports are not admissible to support or oppose summary judgment. *See Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1459, 1463 (D. Colo. 1997). This report, and all other unsworn reports Defendants cite, should not be considered.

fertilizer or soil conditioner. *See* Ex. 39 (Johnson P.I. Test., pp. 489-91); Ex. 40 (Johnson Rpt., ¶ 6(c)). Moreover, land applied poultry waste is not incorporated into the soil by tilling, and so it can run off more easily. *See* Ex. 41 (Fisher Dep., pp. 156-57).

6. Disputed. *See* Resp. to Facts, ¶ 5.

7. Disputed. The cited portion of Dr. Clay's inadmissible report does not stand for the proposition cited. Moreover, poultry waste has been over-applied and in excess of agronomic need on fields in the IRW, and therefore many fields within the IRW do not need phosphorus. *See* Ex. 42 (Ryan P.I. Opening., p. 46); Ex. 40 (Johnson Rpt., ¶¶ 5, 7(e) & 7(i)); Ex. 39 (Johnson P.I. Test., p. 480); Ex. 43 (Chaubey Dep., pp. 175-76).

8. Disputed. Poultry waste is not an effective fertilizer or soil conditioner. *See* Ex. 39 (Johnson P.I. Test., pp. 489-91). While the State regulates poultry waste application, it does not encourage, permit or approve the land application of poultry waste in the IRW. Okla. Admin. Code § 785:45-5-29 & 2 Okla. Stat. § 10-9.1, *et seq.*; Ex. 44 (Gunter Dep., pp. 175-81); Ex. 45 (Parrish Dep., pp. 140 & 152-53); Ex. 46 (Strong Dep., pp. 211, 220 & 245). The State created a program to move poultry waste from areas where it created environmental concerns. *See* Defs.' Ex. 10; Ex. 30 (Tolbert P.I. Test., p. 91). Moreover, the State requires that poultry waste not create an environmental or public health hazard, not result in contamination of waters of the State, and not run off from land application sites. *See* 2 Okla. Stat. § 10-9.7.

9. Disputed. Arkansas recognizes that land application of poultry waste poses serious dangers to the environment. *See* Ark. Code § 15-20-902(3); Ark. Code § 15-20-1102(1)-(3); Ark. Code § 15-20-1103(12); Ark. Code § 15-20-1104(a)(1).

10. Disputed. Poultry waste is being disposed of in the IRW. *See* Ex. 43 (Chaubey Dep., pp. 231-35); Ex. 47 (at p. 5); Ex 48 (Mullikin Dep., pp. 49-50). Moreover, as they have

disclaimed any knowledge of circumstances under which their poultry waste has been land applied in the IRW, Defendants have no evidence that poultry waste generated by their birds has been applied as a fertilizer or soil conditioner. *See* Ex. 49 (at resp. #1 & #2); Ex. 50 (Cal-Maine 30(b)(6) Dep., p. 221); Ex. 51 (at resp. #1 & #2); Ex. 52 (at resp. #1 & #2); Ex. 53 (at resp. #6); Ex. 54 (Cargill 30(b)(6) Dep., p. 230); Ex. 16 (Cargill 30(b)(6) Dep., p. 84); Ex. 55 (at resp. #1). *See also* Resp. to Facts, ¶¶ 1, 7 & 19.

11. Disputed. Poultry waste is not being used as fertilizer in the IRW. *See* Resp. to Facts, ¶¶ 5 & 7. Moreover, the exhibits cited do not support the proposition for which they are cited. Without limitation, Exs. 22 and 23 do not reflect that poultry waste was sold or given away, or that if it was, how much and to whom it was sold or given away. Exs. 21 and 24 similarly do not reflect that poultry waste in Arkansas was sold or given away *to third parties*, *see* Ex. 56 (Engel Dep., pp. 132-42) ("it's been impossible to date to get clear definitions as to what some these columns mean, transferred in particular"), how much poultry waste might have been sold or given away *to third parties*, or the relationship of any such third parties to Defendants. Moreover, there are doubts as to the validity of the ANRC data. *See id.* In any event, that the enormous amounts of poultry waste generated by Defendants' birds raised in the IRW are land applied in the IRW is both the foreseeable and intended means by which the poultry waste is disposed of. *See* Ex. 33 (at p. 14); Ex. 57 (at p. TSN0076CORP); Ex. 58 (Chaubey Dep., p. 32-33); Ex. 59 (12/5/04 advertisement); Ex. 60 (9/10/04 advertisement); Ex. 12 (Dicks Dep., p. 194); Ex. 42 (Ryan P.I. Opening., p. 46).

12. Disputed. Because it is not well-balanced in nutrients and is not a good fertilizer or soil conditioner, *see* Resp. to Facts, ¶ 5, because it has been over-applied and in excess of agronomic need on fields in the IRW, *see* Resp. to Facts, ¶ 7, and because it is being disposed of

in the IRW, *see* Resp. to Facts, ¶ 10, poultry waste is not being used as an appropriate substitute for commercial fertilizer. *See also* Resp. to Facts, ¶¶ 17 & 19.

13. Disputed. Neither source cited supports the proposition that the economic value of poultry waste in the IRW is "substantial." That the State must subsidize poultry waste transport out of the IRW, *see* Ex. 30 (Tolbert P.I. Test., pp. 104-05), contradicts the proposition.

14. Disputed. Defendants specify clean-outs and cake-outs of the poultry houses. *See* Resp. to Facts, ¶ 1.

15. Disputed. Defendants' contracts with their growers, with the exception of Peterson's contracts since 1999 and Simmons' contracts since 2008, do not transfer ownership of the poultry waste to the growers. *See* Ex. 2 (Taylor P.I. Test., p. 938); Ex. 29 (Taylor Dep., pp. 132-34); Ex. 61 (Taylor Aff., ¶ 15); Defs.' MSJ Exs. 5 & 6. With respect to Peterson and Simmons, its contracts with its growers are non-negotiable, *see* Ex. 14 (Wear Dep., pp. 39 & 56-57) & Ex. 9 (Murphy Dep., p. 230), even as to responsibility for poultry waste. *See* Ex. 14 (Wear Dep., pp. 39 & 56-57); Ex. 29 (Taylor Dep., p. 55-56). Moreover, Peterson's employee has opined that irrespective of ownership, poultry integrators would be found liable for the effect it has on the environment. *See* Ex. 62 (Mullikin memo). Finally, neither the affidavits nor the testimony cited (with the exception of that of Mr. Robinson) state that the contract growers own the poultry waste. *See also*, Resp. to Facts, ¶ 1.

16. Not Disputed. Defendants know that it is the practice to apply the poultry waste generated by their birds in the IRW to the land in the IRW.

17. Disputed. Defendants' contracts generally do not transfer ownership of poultry waste to their contract growers. *See* Resp. to Facts, ¶ 15. Further, as demonstrated by the *City of Tulsa* settlement, Defendants have the ability to control the growers and the disposal of the

poultry waste. *See* Ex. 30 (Tolbert P.I. Test., pp. 94-95); Ex. 31 (at pp. 8-9). Knowing full well that poultry waste necessarily follows from the growing of poultry, that their birds generate an enormous amount of poultry waste, *see* Ex. 63 (Engel Aff., ¶¶ 6-11), and that poultry waste has no further use in the poultry growing process, *see* Ex. 39 (Johnson P.I. Test., p. 476); Ex. 2 (Taylor P.I. Test., 944-45); Ex. 64 (Littlefield P.I. Test., p. 2018); Ex. 65 (Daniel Dep., p. 49), Defendants, rather than properly managing it themselves, simply leave this waste behind for their growers to dispose of by land application, *see* Ex. 12 (Dicks Dep., p.194); Ex. 58 (Chaubey Dep., pp. 32-33); Ex. 42 (Ryan P.I. Opening., p. 46); Resp. to Facts, ¶¶ 5-7, 10 & 12, on land that is highly susceptible to pollution from such land-applied waste. *See* Ex. 66 (Fisher Aff. 1, ¶ 6); Ex. 67 (Fisher Aff. 2, ¶¶ 7-27). *See also*, Resp. to Facts, ¶¶ 1 & 19.

18. Disputed. *See* Resp. to Facts, ¶¶ 1, 17 & 19.

19. Disputed. Defendants' conduct influences the timing, location and amount of poultry waste that is land applied in the IRW. Defendants dictate where the growing operations are located, *see* Resp. to Facts, ¶ 1, thus influencing where poultry waste is disposed of by land application. *See also* Ex. 68 (Engel P.I. Test., pp. 446-67); Ex. 66 (Fisher Aff. 1, ¶ 5). Defendants decide when the birds are delivered, *see* Resp. to Facts, ¶ 1, and specify clean-outs and cake-outs of the poultry houses, *see* Resp. to Facts, ¶ 1, thus influencing when poultry waste is disposed of through land application. *See also* Ex. 69 (Fisher P.I. Test., p. 416). And Defendants have concentrated poultry growing operations in the IRW, *see* Ex. 70 (Fisher Aff. 3, ¶ 3), and decide the number of birds delivered to those operations, *see* Resp. to Facts, ¶ 1, thus influencing the amount of poultry waste generated that is disposed of by land application in the IRW. *See also*, Resp. to Facts, ¶ 1.

20. Disputed. Defendants' conduct influences the timing and amount of poultry waste generated, and hence that which can be transferred, in the IRW. *See* Resp. to Facts, ¶¶ 1 & 19.

22. Disputed. Defendants not only "contribute to" the handling and disposal of the poultry waste generated by their birds raised by their contract growers in the IRW -- the applicable standard under RCRA -- but also control their contract growers, thereby participating in and controlling the management, distribution, storage and use of that poultry waste by their contract growers and persons to whom those contract growers may transfer poultry waste. *See* Resp. to Facts, ¶¶ 1, 14-17, 19 & 24-25.

23. Disputed. *See* Resp. to Facts, ¶¶ 1, 11, 14-18, 20 & 22.

24. Disputed. Defendants' statement is vague as it does not identify what laws it is speaking about. Oklahoma law (and to the extent applicable under a choice of law analysis, Arkansas law) does regulate Defendants' conduct by virtue of (1) Defendants' conduct at their own operations, *see* Resp. to Facts, ¶ 2; (2) Defendants' control over their contract growers such that those growers are their agents / employees, *see* Resp. to Facts, ¶¶ 1, 14-21; and (3) the fact that a nuisance and trespass is the foreseeable result of Defendants' contracts with their growers. *See* Resp. to Facts, ¶¶ 1, 4-8, 10-12, 14-20, 22-23 & 26-27; Restatement (Second) Torts, § 427B.

25. Disputed. *See* Resp. to Facts, ¶ 24.

26. Disputed. The term "fate and transport" is susceptible of multiple interpretations, and Defendants do not define the term. In any event, traditional fate and transport studies are unusual in the microbiology field. *See* Ex. 71 (Harwood Aff. 1, ¶ 17). The State relies upon a weight of the evidence approach in establishing that bacteria from land-applied poultry waste is getting in the waters of the IRW. *See* Ex. 71 (Harwood Aff. 1, ¶¶ 2, 4-19 & 44-45) (outlining various lines of evidence -- including published literature, land use in IRW, amount of land-

applied poultry waste in IRW, pathogens known to be in poultry waste, mass balance reflecting poultry's share of bacterial loading in IRW, environmental sampling and analysis in IRW, hydrology and geology of the IRW, PCA and PCR -- used to support conclusion). Defendants' citations do not support the proposition that the State did not conduct an analysis, appropriate to the circumstances, of the fate and transport of poultry waste and its constituents in the IRW. The fact is that the State's analysis of the fate and transport of poultry waste and its constituents in the IRW reveals the presence of constituents of poultry waste (including bacteria) at each environmental compartment -- from the poultry houses, to the edge of fields, to the groundwater and streams, to the Illinois River and Lake Tenkiller. *See* Ex. 72 (Olsen Dep., pp. 18-27).

27. Disputed. While different bacteria can theoretically have somewhat different characteristics as to their movement in the environment, the fact is that, as pertains here, pathogenic bacteria from land applied poultry waste *are* getting in the waters of the IRW. The USDA and the USGS have so found:

- "Phosphorus and pathogenic bacteria now impair many of the area streams including the Illinois River. . . . Nonpoint source impacts affecting waters in this segment are primarily from pastureland that is also used for application of poultry litter as fertilizer." Ex. 73 (USDA Farm Service Agency, *Final Programmatic Environmental Assessment for Implementation of the Conservation Reserve Enhancement Program Agreement for the Illinois River Watershed in Arkansas* (August 2007), pp. A-5-A-6).
- "The watersheds of Spavinaw and Tenkiller Lakes constitute a major poultry growing and cattle producing area. Poultry litter has been applied to the nutrient poor, thin, cherty soils of the area The Illinois River is impaired by phosphorus and many of the area streams are impaired by pathogenic bacteria." Ex. 74 (USDA Farm Service Agency, *Final Programmatic Environmental Assessment for Implementation of the Conservation Reserve Enhancement Program Agreement for Oklahoma* (July 2006), p. A-5).
- "Production of large numbers of poultry, cattle, and swine in northwestern Arkansas, and increasingly in southwestern Missouri and northeastern Oklahoma, is contributing to elevated nutrient and bacteria concentrations in streams." Ex. 75 (USGS, *Environmental and Hydrologic Setting of the Ozark Plateaus Study Unit, Arkansas, Kansas, Missouri, and Oklahoma*, Water Resources Investigations Report 94-4022 (1995), p. 61).

The State of Arkansas has so found:

- "Runoff water from areas where manure is improperly managed can carry excessive amounts of nutrients, bacteria, and sediments. These pollutants can enter streams and leach into the underground water." Ex. 76 (Arkansas Soil & Water Conservation Commission, *Comprehensive Management Plan for Nonpoint Source Pollution -- Illinois River Basin in Arkansas* (1996), p. 16).

The State of Oklahoma has so found:

- In the IRW, segments of the Illinois River, Baron Fork and Flint Creek, as well as other waters, have been listed by the State as impaired by *Enterococcus*, *E. coli*, and / or fecal coliform. See Ex. 77 (Water Quality in Oklahoma -- 2008 Integrated Report, pp. 7, 55-56, App. B pp. 32-36, App. C pp. 15-16). These listings attribute "animal feeding operations (NPS)" and "impacts from land application of wastes" as potential sources of the impairments at issue. See *id.* The EPA has approved these listings. See Ex. 78 (10/22/08 letter); Ex. 79 (Decision Document for Final EPA Action).

The State's retained experts have so found:

- "[M]y opinion is that the poultry waste -- land application of poultry waste in the IRW is a major contributor to elevated indicator bacteria loads in the Illinois River Watershed in these waters." Ex. 37 (Harwood P.I. Test., p. 672); see also Ex. 37 (Harwood P.I. Test., pp. 646 & 663-66).
- "Land application of poultry waste affects the chemical and bacterial water and sediment composition of the IRW and the affect is observable in surface water, groundwater and sediments collected from the IRW. Poultry waste is the dominant source of contamination in the IRW." Ex. 80 (Olsen Aff., ¶ 5-6); see also Ex. 81 (Olsen P.I. Test., 827-828).
- "The microbial condition of waterbodies in other parts of Oklahoma . . . is not relevant to the health risks posed by conditions in the IRW. Whatever the source of bacteria elsewhere, a major contribution in the IRW is from land application of poultry waste." See Ex. 82 (Teaf Aff., ¶¶ 8-9); see also Ex. 35 (Teaf P.I. Test., pp. 207 & 222).

Even Defendants and Defendants' expert agree that pathogenic bacteria from land-applied poultry waste can run-off into surface and ground waters:

- "Animal waste is a potential source of some 150 disease-causing organisms or pathogens. . . . When found in water or wastes, these pathogens pose significant threats to humans and other animals through drinking water, contact with the skin, or consumption of fish or other aquatic animals. Most pathogens die relatively quickly. However, under the right conditions, they may live long enough to cause problems. They may persist longer in groundwater than in surface water." Ex. 83 (at PIGEON0630-31).

- Defendants' expert agreeing that a central risk arising from the disposal of poultry waste is the spread of enteric pathogens, including Salmonella and Campylobacter, and that these pathogens can reach watersheds after rainfall events and thereby increase risk associated with the recreational use of waters. Ex. 84 (Myoda P.I. Test., pp. 1929-30).

In fact, tellingly, nowhere in their statement of undisputed facts do Defendants actually assert that bacteria from poultry waste are not getting into the waters of the IRW.

28. Disputed. Hundreds of thousands of tons of pathogenic bacteria-laden poultry waste are land-applied in the IRW annually. See Ex. 41 (Fisher Dep., p. 193). Poultry waste is responsible for over 40% of all fecal coliform loadings to the IRW. See Ex. 82 (Teaf Aff., ¶ 9). Bacteria in land applied poultry waste survives in the environment. See Ex. 37 (Harwood P.I. Test., p. 636); Ex. 36 (Lawrence P.I. Test., p. 1170); Ex. 35 (Teaf P.I. Test., pp. 213-19 & 304-5); Ex. 85 (Teaf Dep., pp. 91-92); Ex. 82 (Teaf Aff., ¶ 7); see also Ex. 71 (Harwood Aff. 1, ¶ 17) (edge-of-field samples from poultry-waste-applied-land reflecting indicator bacteria levels approaching concentrations in raw sewage).

29. Disputed. The microbial condition of water in other parts of the State is not relevant to the health risks posed by conditions in the IRW. Whatever the source of bacteria elsewhere, a major contribution in the IRW is from land application of poultry waste. See Ex. 82 (Teaf Aff., ¶¶ 8-9); see also Ex. 77 (at pp. 7, 55-56, App. B pp. 32-36, App. C pp. 15-16) (IRW bacterial impairments identifying "animal feeding operations (NPS)" and "impacts from land application of wastes" as potential sources). Dr. Sullivan's opinions, on whom Defendants rely for this point, are flawed because he did not compare single sample bacteria levels in the IRW or violations of water quality standards in the IRW to those in other parts of the state, and he lacked adequate data to determine whether bacterial geometric mean standards were violated outside the IRW. See Ex. 86 (Sullivan Dep., pp. 273-74, 276-91, 300-01, 312-13 & 315-17).

30. Disputed. The presence of fecal indicator bacteria is more than merely suggestive of the presence of pathogenic bacteria; it is highly predictive of the presence of pathogenic bacteria. *See* Ex. 36 (Lawrence P.I. Test., pp. 1185-86); Ex. 37 (Harwood P.I. Test., p. 634); Ex. 71 (Harwood Aff. 1, ¶¶ 8-9); Ex. 82 (Teaf Aff., ¶¶ 10-11).

31. Disputed. The implied suggestion that the use of indicator bacteria is not reliable in assessing human health risk when the source of the bacterial contamination is animal waste is without foundation. *See* Ex. 71 (Harwood Aff. 1, ¶¶ 8-9); Ex. 82 (Teaf Aff., ¶¶ 10-11).

32. Disputed. The use of fecal indicator bacteria is neither out-of-date nor scientifically indefensible. The reliability and practicality of protecting public health by enumerating fecal indicator bacteria has led to the continued use of this practice worldwide for over 100 years, and indicator bacteria standards will doubtlessly be used to protect the health of recreational water users in the United States for the foreseeable future. *See* Ex. 71 (Harwood Aff. 1, ¶¶ 8-9). It is the current standard employed by EPA and the State. *See* Ex. 87 (Lawrence Dep., pp. 146-47); Ex. 82 (Teaf Aff., ¶ 12); 785 Okla. Admin. Code 45-1-1, *et seq.*

33. Disputed. Pathogens can be very difficult to detect in the environment, particularly in water samples, and are often in a viable (and still infectious) but nonculturable state. Thus, the State's sampling results are not surprising and underscore the appropriateness of the use of the reliable indicator bacteria method. *See* 88 (Harwood Aff. 2, ¶¶ 3-9); Ex. 71 (Harwood Aff. 1, ¶ 16); Resp. to Facts, ¶¶ 30-32.

34. Disputed. Adair County's reported rates of campylobacteriosis exceeded the state average for 1997-2005, and its reported rates of salmonellosis periodically exceeded the state average between 1997-2005. *See* Ex. 82 (Teaf Aff., ¶ 13). Sequoyah County's reported rates of salmonellosis exceeded the state average for all but 3 years between 1990-2001. *See id.*

35. Disputed. The State has listed segments of the Illinois River, Baron Fork and Flint Creek, as well as other IRW waters, as impaired by *Enterococcus*, *E. coli*, and / or fecal coliform. *See* Ex. 77 (at pp. 7, 55-56, App. B pp. 32-36, App. C pp. 15-16). These listings attribute "animal feeding operations (NPS)" and "impacts from land application of wastes" as potential sources of the impairments at issue. *See id.* Such impairments are *per se* endangerments to human health. *See* Okla. Admin. Code § 785:45-5-16. Additionally, the State has issued bacterial warnings for its Scenic Rivers. *See* Ex. 89. Finally, Dr. Banner is not an Oklahoma public health official, and his unsworn report is inadmissible. *See* fn. 2.

36. Disputed. While the State cannot identify any specific person sickened by exposure to poultry waste-impacted IRW water, the epidemiological evidence is clear that a significant number of people are becoming ill (and many more are being put at risk). *See* Ex. 36 (Lawrence P.I. Test., pp. 1181); Ex. 90 (Harwood Dep., pp. 294-96). Moreover, there is under-reporting of such illnesses. *See* Ex. 36 (Lawrence P.I. Test., pp. 1183-84, 1192-93 & 1252-54); *see also* Ex. 71 (Harwood Aff. 1, ¶ 5); Ex. 82 (Teaf Aff., ¶¶ 14-15). Drs. Harwood, Teaf and Lawrence all agree that bacteria from poultry waste in the IRW's waters is presenting an imminent and substantial endangerment to human health. *See* Ex. 37 (Harwood P.I. Test., pp. 645-646); Ex. 35 (Teaf P.I. Test., pp. 222-23); Ex. 36 (Lawrence P.I. Test., pp. 1197); *see also* Ex. 71 (Harwood Aff. 1, ¶¶ 7 & 44) (noting very recent study showing that largest risk factor for gastroenteritis in children caused by *Campylobacter*, *Salmonella* or pathogenic *E. coli* strains is recreational water use, rather than consumption of certain foods).

37. Disputed. Just as the EPA characterized animal waste as a RCRA solid waste in its lawsuit against Seaboard Farms, *see* Ex. 91, the State has characterized poultry waste as a RCRA solid waste in this lawsuit.

III. The Summary Judgment Standard

The summary judgment standard is well-established, and is set forth in *Lumpkin v. United States Recovery Systems*, 2009 U.S. Dist. LEXIS 7578, *2-3 (N.D. Okla. Feb. 3, 2009).

IV. Argument and Authorities³

A. Poultry waste is a solid waste within the meaning of 42 U.S.C. § 6903(27)

Defendants advance three basic arguments in support of their contention that poultry waste is not a solid waste. First, Defendants argue that poultry waste is not "discarded" as that term is understood under RCRA. Second, Defendants argue that significance should be assigned to whether EPA *regulates* animal waste under RCRA. And third, Defendants argue that poultry waste as used in the IRW is not a solid waste. Each of these arguments fails.

The State has brought a RCRA citizen suit based upon threats of an imminent and substantial endangerment to health or the environment under 42 U.S.C. § 6972(a)(1)(B). The State's RCRA claim is based upon poultry waste being a "solid waste." Because the State's claim is an endangerment claim, the *statutory* definition of "solid waste" found in 42 U.S.C. § 6903(27) -- rather than any narrower *regulatory* definition of "solid waste" -- provides the applicable definition. See *Connecticut Coastal Fishermen's Assoc. v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1314-15 (2d Cir. 1993) ("the broader statutory definition of solid waste applies to citizen suits brought to abate imminent hazard to health or the environment"). Thus, Defendants' argument that significance should be assigned to whether EPA *regulates* animal waste under RCRA is irrelevant. Similarly, Defendants' assertions concerning whether Oklahoma or

³ In its Motion for Partial Summary Judgment, DKT #2062, the State sets out in more detail the facts, arguments and authorities demonstrating that poultry waste is a "solid waste" and that Defendants have "contributor" liability, as well as an explanation of the "may present an imminent and substantial endangerment" standard. Thus, the State respectfully directs the Court to those more fulsome presentations contained in DKT #2062.

Arkansas *regulates* poultry waste as a solid waste are likewise irrelevant. As such, pages 14-19 of Defendants' Motion, which focus on regulation of animal waste, should be disregarded.

The *statutory* definition of "solid waste" provides:

The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material *resulting from* industrial, commercial, mining, and *agricultural operations*, and from community activities

42 U.S.C. § 6903(27) (emphasis added).

1. Poultry waste is a "discarded material . . . resulting from . . . agricultural operations"

Under 42 U.S.C. § 6903(27), the term "solid waste" includes "discarded material . . . resulting from . . . agricultural operations." Poultry waste fits this definition. Poultry waste clearly results from agricultural operations. *See, e.g.*, Resp. to Facts, ¶¶ 4 & 17. Thus, the sole question is whether it is a "discarded material." Although RCRA does not define "discarded," there is a significant body of caselaw that has clarified the meaning of the term. One of the earliest cases addressing the term, *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) ("*AMC*"), remains the guidepost. In that case, the D.C. Circuit noted that "[t]he ordinary, plain-English meaning of the word 'discarded' is 'disposed of,' 'thrown away' or 'abandoned,'" *id.* at 1184, and concluded that materials "have not yet become part of the waste disposal problem" - *i.e.*, discarded -- where they are "*destined for beneficial reuse or recycling in a continuous process by the generating industry itself.*" *Id.* at 1186 (emphasis in original).

This test has subsequently been applied in multiple circuits.⁴ In the agricultural context, the Ninth Circuit, in *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004), relying on

⁴ *United States v. ILCO*, 996 F.2d 1126 (11th Cir. 1993) (even though used lead batteries might have value to someone in another industry does not preclude them from being

AMC, *AMC II* and *ILCO*, held that because *the same growers* reuse the grass residue in a continuous process for Kentucky bluegrass production, grass residue remaining after the Kentucky bluegrass harvest is not "discarded," and hence not a "solid waste," within the meaning of RCRA. *Id.* at 1045.⁵ Moreover, the Ninth Circuit stated: "We recognize that the issue of monetary value does not affect the analysis of whether materials are 'solid waste' under RCRA." *Id.* at 1043 fn. 8.⁶

Applying the teaching of *AMC*, *AMC II*, *ILCO*, *Owen Elec.* and *Safe Air*, it is clear that poultry waste *is* a "discarded material." Poultry waste is *unequivocally not* being reused by Defendants or poultry growers in a continuous process for growing poultry; it is undisputed that poultry waste has *no* further use in the poultry growing process. *See* Resp. to Facts, ¶ 17. The mere fact that poultry waste has the potential, in appropriate circumstances (not present here), to be reused in an entirely different agricultural enterprise at some later time *in no way* diminishes the fact that poultry waste when it leaves the poultry growing house is being discarded and is

viewed as "discarded"); *Owen Elec. Steel Co. of South Carolina, Inc. v. Browner*, 37 F.3d 146 (4th Cir. 1994) (unless a material is destined for immediate reuse in the generating industry it "is justifiably seen as 'part of the waste disposal problem'"); & *American Mining Congress v. EPA*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) ("*AMC II*") (the mere potential of being reused in the future does not preclude a material from being deemed "discarded").

⁵ Trying to cobble together cases for the erroneous proposition that courts look to whether a waste has a beneficial reuse in determining whether the waste has been discarded, *see* Motion, pp. 11-12, Defendants rely upon *No Spray Coalition, Inc. v. City of New York*, 2000 WL 1401458 (S.D.N.Y. Sept. 25, 2000) (pesticide sprayed to kill mosquitoes is not "discarded") and *Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club*, 2005 U.S. Dist LEXIS 11699 (D. Conn. June 14, 2005) (bullet fired from gun is not "discarded"). These two cases are readily distinguishable. They address a first use of a new product, not a purported reuse of a waste product. Poultry waste is a waste product from the poultry growing process, not a new product.

⁶ Contrary to Defendants' assertion, the *Safe Air* Court did not hold that "even an incidental agricultural benefit takes a practice outside of RCRA's scope." *See Safe Air*, 373 F.3d at 1044-45 (describing reuse as one "effectively designed to produce Kentucky bluegrass").

"part of the waste disposal problem." *See AMC*, 824 F.2d at 1186. As such, poultry waste is a "discarded material," and thus a "solid waste."⁷

2. There is no manure exception to 42 U.S.C. § 6903(27)

As is evident from the plain language of the statutory definition of "solid waste," *see* 42 U.S.C. § 6903(27), there is nothing exempting manures.⁸ In fact, as detailed above, the statutory definition of "solid waste" specifically *includes* "discarded materials" resulting from "agricultural operations." Ignoring this plain language, Defendants argue that manures are excluded from RCRA's statutory definition of "solid waste" on the basis of a brief passage in H.R. Rep. No. 94-1491, 94th Cong., 2d Sess., at 2, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240. Lifting an isolated passage from the legislative history to attempt to engraft an exception onto the statutory definition of "solid waste," however, is contrary to the rules governing statutory construction. Statutes, not committee reports, are the authoritative expressions of the law. *See City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) (interpreting RCRA provision).⁹

⁷ Defendants cite to *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003). Reliance on that case, however, is unavailing. In that case the recycled materials at issue were identical to the virgin materials being used to produce zinc fertilizers and were dependent on an EPA *regulatory* scheme, and thus it is plainly not analogous to the factual scenario here. In any event, there can be no contention that poultry waste is identical to commercial fertilizer. Unlike commercial fertilizer, poultry waste is a poor and unbalanced fertilizer. *See Resp. to Facts*, ¶ 8. The differences between poultry waste and commercial fertilizer cannot be characterized as "so slight as to be substantially meaningless." *See Safe Food*, 350 F.3d at 1270.

⁸ Significantly, Congress knew how to create exemptions to the *statutory* definition of "solid waste" where it wanted to. Congress explicitly carved out three specific exemptions in the definition, *see* 42 U.S.C. § 6903(27), but none of them pertains to manures.

⁹ Moreover, in any event, a close read of the committee report Defendants rely upon reveals that it does not support Defendants' argument. The report states as follows: "Agricultural wastes which are *returned to* the soil as fertilizers or soil conditions are not considered discarded materials in the sense of this legislation." H.R. Rep. No. 94-1491, 2d Sess. at 2 (emphasis added). Unlike, for example, Bermuda grass stubble, however, poultry waste indisputably does not originate from the IRW soil, so by definition it cannot be "returned to" the IRW soil. Thus, this legislative history is simply irrelevant to poultry waste.

EPA agrees that the statutory definition of "solid waste" contains no manure exemption. *See* Resp. to Facts, ¶ 37. In *United States v. Seaboard Foods, LP, et al.*, 5:06-cv-00990-HE (W.D. Okla.) (Sept. 14, 2006), the United States, on behalf of EPA, brought an enforcement action against a manure generator alleging that land-applied swine effluent was a "solid waste" that created an imminent and substantial endangerment under 42 U.S.C. § 6973.¹⁰ Specifically, the United States alleged that "[s]wine effluent that has been over-applied on fields or otherwise permitted to leach into ground water, such as from a leaking lagoon, barn, or other infrastructure such as piping, is a 'discarded material' from 'agricultural operations' and thus is a 'solid waste' as defined by Section 1004(27) of RCRA, 42 U.S.C. § 6903(27)." This allegation demonstrates that it is EPA's position not only that 42 U.S.C. § 6903(27) (and not some regulatory definition) provides the operative definition of "solid waste" for RCRA endangerment actions, but also that there is no manure exemption in that statutory definition. This Court should defer to EPA's position on this matter. *See Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 558 (10th Cir. 1986).

3. Defendants' argument that poultry waste as used in the IRW is not a solid waste fails

As there is no manure exception to the statutory definition of solid waste, this argument is flawed from the get-go. However, even assuming *arguendo* that there were such an exception, it would at most exempt only those manures that are *in fact* returned to the soil as *actual* fertilizer or soil conditioner -- something Defendants cannot establish is occurring in the IRW.

The party seeking the protections of an exception under RCRA bears the burden of establishing the exception's applicability. *See, e.g., City of Lodi v. M & P Inv.*, 308 F.Supp.2d 1137, 1145-46 (E.D. Cal. 2003); *United States v. Eastern of New Jersey, Inc.*, 770 F.Supp. 964,

¹⁰ 42 U.S.C. § 6973 is the federal government analog to the 42 U.S.C. § 6972(a)(1)(B) citizen suit provision. *See, e.g., Connecticut Coastal*, 989 F.2d at 1314-15.

978 (D.N.J. 1991). Thus, were such an exception to even exist, Defendants would be required to *prove the exception as to each instance of poultry waste disposal*. Defendants did not do so in their moving papers, nor can they. First, Defendants have disclaimed any knowledge as to the specifics of land application in the IRW. *See* Resp. to Facts, ¶ 10. Second, poultry waste is not being used as a fertilizer or soil amendment in the IRW. *See* Resp. to Facts, ¶¶ 5-7, 10 & 12-13. And third, Defendants do not dispute that poultry waste has been overapplied in the IRW. *See* Resp. to Facts, ¶ 7.¹¹ In sum, Defendants' IRW-specific argument fails.

B. Defendants have contributed / are contributing to the handling or disposal of poultry waste in the IRW

Without citation to any applicable caselaw, Defendants assert that to establish "contributor" liability under RCRA the State must prove Defendants have "control" over the handling and disposal of the poultry waste. However, RCRA "contributor" liability has no such requirement. *See United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) ("We also disagree with the district court's conclusion that an explicit allegation of "control" is required [to find 'contributing to' liability]"); *United States v. Valentine*, 885 F. Supp. 1506, 1512 (D. Wyo. 1995) ("it is not necessary that a party have control over the ultimate decisions concerning waste disposal or over the handling of materials at a site in order to be found to be a contributor within the purview of RCRA"). Thus, Defendants' argument fails.

¹¹ Defendants suggest that one should look to whether the solid waste as a whole has some benefit in the reuse -- no matter how incidental that benefit might be -- and entirely overlook the fact that one or more constituents of the solid waste has an adverse environmental effect. This specious argument would insulate pollution-causing mixtures so long as there is one "beneficial" constituent and encourage "sham" recycling. This result would be inconsistent with EPA policy. *See, e.g.*, 50 Fed. Reg. 614, 618 (EPA "is guided by the principle that the paramount and overriding statutory objective of RCRA is protection of human health and the environment. The statutory policy of encouraging recycling is secondary and must give way if it is in conflict with the principle objective") (citations omitted).

The fact is that the scope of "contributor" liability under RCRA is extremely broad, and the State need merely show that Defendants "have a part or share in producing an effect." *See Cox v. City of Dallas, Texas*, 256 F.3d 281, 294-95 (5th Cir. 2001). As explained in *Cox*:

Our sister circuits have drawn upon the plain meaning of the word "contribute" and on the legislative history as well to interpret the "contributing to" phrase under the analogous § 6973 provision. *See, e.g., Aceto*, 872 F.2d at 1383 ("The relevant legislative history supports a broad, rather than a narrow, construction of the phrase 'contributed to.'"); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 167 (4th Cir. 1984) ("Congress's intent, then, was to establish a standard of liability by incorporating and expanding upon the common law."). The Court of Appeals for the Fourth Circuit aptly summarized congressional intent regarding interpretations of phrases such as "contributing to":

[Congress has mandated] that the former common law of nuisance, as applied to situations in which a risk of harm from solid or hazardous wastes exists, shall include new terms and concepts which shall be developed in a liberal, not a restrictive, manner. This ensures that problems that Congress could not have anticipated when passing the [RCRA] will be dealt with in a way minimizing the risk of harm to the environment and the public.

Waste Indus., 734 F.2d at 167. (citations omitted). Therefore, *we follow our sister circuits' lead and interpret "contribute" to mean "have a part or share in producing an effect."*

Id. (emphasis added) (some citations omitted).

A defendant need not have a direct hand in the disposal of solid waste in order to be encompassed within the expansive reach of "contributor" liability under RCRA. *Cox*, 256 F.3d at 296-97, explains:

. . . Negligent oversight of disposal is actionable under the RCRA. . . . The district court did not clearly err in finding that this "lax oversight" of its contractors and their disposal of City waste is evidence of the City's "contributing to" liability. . . . The City's actions therefore snugly fit the "failed to exercise due care in selecting or instructing the entity actually conducting the disposal" statement from S. Rep. No. 96-172, at 5 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023. . . . This situation also closely parallels an example considered in a 1979 House Committee Report and a 1979 Senate Report, *i.e.*, that a generator of solid waste is subject to liability even when someone else conducted the disposal

at the generator's request. *See* S. Rep. No. 96-172, at 5 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023; H.R. Comm. Print No. 96-IFC 31, at 31 (1979).

(Some citations omitted.) *See also Aceto*, 872 F.2d at 1383 (finding contributor liability where defendants contracted with company to formulate pesticides, supplied specifications for the pesticides, retained ownership of the pesticide throughout the process, and generation of wastes was inherent in the process); *Valentine*, 885 F. Supp. at 1512.

The legislative history supports this broad reading of "contributor" liability under RCRA:

. . . Section 7003 should not be construed solely with respect to the common law. Some terms and concepts, such as persons "contributing to" disposal resulting in a substantial endangerment, are meant to be more liberal than their common law counterparts. *For example, a company that generated hazardous waste might be someone 'contributing to' an endangerment under Section 7003 even where someone else deposited the waste in an improper site (similar to strict liability under common law), where the generator had knowledge of the illicit disposal or failed to exercise due care in selecting or instructing the entity actually conducting the disposal.*

See S. Rep. No. 96-172 (1980) (emphasis added).

Inherent in Defendants' business model for raising their birds in the IRW is the generation of an enormous quantity of bacteria and phosphorus-laden poultry waste that will be disposed of in a very limited geographical region that is highly susceptible to water pollution. To wit: (1) Defendants have concentrated the growing of their birds in the IRW, an area which is highly susceptible to runoff and leaching, *see* Resp. to Facts, ¶¶ 1, 8-9, 17, 19 & 27; (2) Defendants grow tens of millions of birds in that small area, resulting in hundreds of thousands of tons of waste from their birds being generated and disposed of in the IRW annually, *see* Resp. to Facts, ¶¶ 1, 17 & 28; (3) Defendants dictate all aspects of poultry production, including clean outs, *see* Resp. to Facts, ¶¶ 1, 14-15, 19-20 & 22-25; (4) Defendants promote the use of the waste from their birds in spite of the fact that it is not a well-balanced fertilizer and is high in phosphorus and bacteria and has been over applied, *see* Resp. to Facts, ¶¶ 4, 5, 7, 8 & 11-12; (5)

Defendants induce farmers to raise poultry by offering access to this waste, *see* Motion, Fact No. 16; (6) Defendants can control the land application of these wastes, *see* Resp. to Facts, ¶¶ 1 & 17-25; and (7) Defendants strongly influence the timing, location and amount of poultry waste disposal in the IRW, *see* Resp. to Facts, ¶¶ 1 & 17-25. These facts taken together clearly demonstrate that Defendants "have a part or share in producing" not only the enormous volumes of poultry waste, but also the circumstances under and manner in which that poultry waste is handled and disposed of in the IRW. *See Cox*, 256 F.3d at 294-97; *Aceto*, 872 F.2d at 1383; *Valentine*, 885 F. Supp. at 1512. Defendants are thus "contributors" within the meaning of RCRA. Defendants' Motion for Summary Judgment on this issue must be denied.¹²

C. Land-applied poultry waste "may present" an imminent and substantial endangerment to health or the environment in the IRW¹³

Burlington N. & Santa Fe Ry. Co. v. Grant, 505 F.3d 1013 (10th Cir. 2007), provides the guideposts for evaluating RCRA endangerment claims. Significantly, the State's RCRA endangerment claim is no longer subject to "heightened burden" evidentiary standard for preliminary injunction proceedings set out in *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 974-76 (10th Cir. 2004) (en banc).

¹² Even assuming *arguendo* that "control" were the correct test for establishing "contributor" liability, Defendants' Motion would still fail. Where an employer exercises control over the contractor, the employer is liable for the acts of the contractor. *See Page v. Hardy*, 334 P.2d 782, 784-85 (Okla. 1958). Similarly, a principal is liable for the acts of its agent. *See Roring v. Hoggard*, 326 P.2d 812, 814 (Okla. 1958). The State has alleged that the contract growers are the employees and / or agents of Defendants, *see* SAC, ¶¶ 6-12 & 42, and has provided evidence establishing that fact. *See* Resp. to Facts, ¶¶ 1, 14 & 17-25. Because there exist genuine issues of material fact on this issue, summary judgment is inappropriate. *See, e.g., City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1293-94 (N.D. Okla. 2003), *vacated in connection with settlement* (denying summary judgment on control issue).

¹³ As noted above, Defendants have raised arguments with respect to only certain aspects of the State's endangerment claim. As to those endangerments they have not addressed -- endangerments to human health from cyanobacteria (blue-green algae) and to the environment from phosphorus, as well as the source of the phosphorus resulting in DBPs -- they are not before the Court and not appropriate for summary judgment consideration. *See, supra*, fn. 1.

1. Bacteria from poultry waste in the waters of the IRW may present a human health endangerment

First, compelling and persuasive evidence shows poultry waste is a source of the bacteria in the waters of the IRW.¹⁴ The federal government, the State of Oklahoma government, the State of Arkansas government and the State's experts in this case, *see* Resp. to Facts, ¶ 27, *all* say so.¹⁵ Significantly, nowhere in their statement of undisputed facts do Defendants actually assert that bacteria from poultry waste are not a source of the bacteria in the waters of the IRW. The State's evidence is thus substantial, and reflects genuine issues of material fact.¹⁶

Second, it is clear that these bacteria may present a human health endangerment. Contrary to Defendants' assertion, *see* Motion, p. 24, the use of indicator bacteria to show risk to humans -- regardless of the source of the contamination -- is well-accepted and utilized by the EPA and the State of Oklahoma.¹⁷ *See* Resp. to Facts, ¶¶ 30-32. Moreover, none of Defendants' related arguments have merit. That pathogenic bacteria were not always detected in the State's

¹⁴ The State need not prove poultry waste is the sole source of the bacteria in the water. *See Oklahoma v. Tyson Foods, Inc.*, 2009 U.S. App. LEXIS 10170 (10th Cir. May 13, 2009); *see also American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 520 (4th Cir. N.C. 2003) ("It would be strange indeed if polluters were protected from suit simply by virtue of the fact that others were also engaging in the illegal activity"). Moreover, poultry waste is responsible for over 40% of all fecal coliform loadings to the IRW. *See* Ex. 82 (Teaf Aff., ¶ 9).

¹⁵ Defendants' assertion that Dr. Harwood's PCR work is the only evidence that poultry waste is a source of bacteria in the waters of the IRW, *see* Motion, p. 24, is false. As Dr. Harwood herself states, PCR is but one tool among many used to build the weight of the evidence that land-applied poultry waste represents a human health endangerment in the IRW. *See* Ex. 71 (Harwood Aff. 1, ¶ 2). In any event, Dr. Harwood's PCR work is admissible for the reasons stated in the State's opposition to Defendants' *Daubert* motion. *See* DKT #2115.

¹⁶ The State may prove that poultry waste is a source of the bacteria in the waters of the IRW by circumstantial evidence. *See, e.g., Tosco Corp. v. Koch Indus.*, 216 F.3d 886, 892 (10th Cir. 2000); *Ohio Oil Co. v. Elliott*, 254 F.2d 832, 834 (10th Cir. 1958); *Mid-Continent Petroleum Corp. v. Miller*, 79 P.2d 804, 805 (Okla. 1938); *King v. State*, 109 P.2d 836, 838 (Okla. Crim. App. 1941); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 163 (4th Cir. 2000) (*en banc*).

¹⁷ Defendants attempt to support their argument through use of an unattributed peer review comment. *See* Defs.' Ex. 37. This comment is hearsay, lacks foundation and is otherwise inadmissible, and should not be considered.

testing is a reflection of the common viable-but-not-culturable phenomenon in bacterial sampling (hence the use of the reliable indicator bacteria method). *See* Resp. to Facts, ¶ 33. That there has not been an increase in illness rates vis-à-vis the rest of the state is simply incorrect. *See* Resp. to Facts, ¶ 34. That the State does not view the bacteria in the waters of the IRW as a problem is likewise incorrect. *See* Resp. to Facts, ¶ 35. And that the State cannot identify a specific individual who has become sick from waters polluted by poultry-waste bacteria ignores the well-accepted epidemiology upon which the State's water quality standards are based. *See* Resp. to Facts, ¶ 36. As the facts cited above establish, bacteria from poultry waste may present (and in fact are presenting) an imminent and substantial endangerment to human health in the IRW. *See* Resp. to Facts, ¶¶ 4 & 26-36. In sum, genuine issues of material fact preclude summary judgment on the State's endangerment to human health from bacteria claim.

2. DBPs may present a human health endangerment in the drinking water of the IRW

As the State will demonstrate in its response on June 5, Dr. Teaf's opinions concerning DBPs and the health endangerment they present in the IRW are admissible under *Daubert*. Moreover, contrary to Defendants' assertion, Dr. Teaf's opinions are not the only evidence the State has regarding DBPs. For instance, Dr. Cooke opines extensively about DBPs. *See, e.g.*, Ex. 92 (Cooke Dep., pp. 18, 153-61 & 176) (testifying that DBPs are strongly associated with cancer and embryo toxic effects, there are exceedences in the IRW, and poultry waste in the IRW is a source of the DBP problem). *See also* Ex. 93 (McGuire Dep., p. 315) (testifying to DBP exceedences in the IRW). As the State has at least two experts qualified to testify regarding the endangerment presented by DBPs in the IRW, Defendants' Motion must be denied.

V. Conclusion

WHEREFORE, Defendants' Motion [DKT #2050] should be denied in its entirety.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch OBA #17067
ASSISTANT ATTORNEYS GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/ Richard T. Garren

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
David P. Page OBA #6852
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis W. Bullock OBA #1305
Robert M. Blakemore OBA 18656
BULLOCK, BULLOCK & BLAKEMORE
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

Frederick C. Baker
(admitted *pro hac vice*)
Lee M. Heath
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
 (admitted *pro hac vice*)
 Ingrid L. Moll
 (admitted *pro hac vice*)
 MOTLEY RICE, LLC
 20 Church Street, 17th Floor
 Hartford, CT 06103
 (860) 882-1676

Jonathan D. Orent
 (admitted *pro hac vice*)
 Michael G. Rousseau
 (admitted *pro hac vice*)
 Fidelma L. Fitzpatrick
 (admitted *pro hac vice*)
 MOTLEY RICE, LLC
 321 South Main Street
 Providence, RI 02940
 (401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	
Louis Werner Bullock	lbullock@bullock-blakemore.com
Robert M. Blakemore	bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	
Frederick C. Baker	fbaker@motleyrice.com

Lee M. Heath	lheath@motleyrice.com
Elizabeth C. Ward	lward@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
MOTLEY RICE, LLC	
<u>Counsel for State of Oklahoma</u>	
Robert P. Redemann	rredemann@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.	
David C. Senger	david@cgmlawok.com
Robert E Sanders	rsanders@youngwilliams.com
Edwin Stephen Williams	steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.	
<u>Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.</u>	
John H. Tucker	jtucker@rhodesokla.com
Theresa Noble Hill	thill@rhodesokla.com
Colin Hampton Tucker	ctucker@rhodesokla.com
Kerry R. Lewis	klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE	
Terry Wayen West	terry@thewestlawfirm.com
THE WEST LAW FIRM	
Delmar R. Ehrich	dehrich@faegre.com
Bruce Jones	bjones@faegre.com
Krisann C. Kleibacker Lee	kklee@faegre.com
Todd P. Walker	twalker@faegre.com
Christopher H. Dolan	cdolan@faegre.com
Melissa C. Collins	mcollins@faegre.com
Colin C. Deihl	cdeihl@faegre.com
Randall E. Kahnke	rkahnke@faegre.com
FAEGRE & BENSON, LLP	
Dara D. Mann	dmann@mckennalong.com
MCKENNA, LONG & ALDRIDGE LLP	
<u>Counsel for Cargill, Inc. & Cargill Turkey Production, LLC</u>	

James Martin Graves	jgraves@bassettlawfirm.com
Gary V Weeks	gweeks@bassettlawfirm.com
Woody Bassett	wbassett@bassettlawfirm.com
K. C. Dupps Tucker	kctucker@bassettlawfirm.com
Earl Lee "Buddy" Chadick	bchadick@bassettlawfirm.com
BASSETT LAW FIRM	
George W. Owens	gwo@owenslawfirmmpc.com
Randall E. Rose	rer@owenslawfirmmpc.com
OWENS LAW FIRM, P.C.	
<u>Counsel for George's Inc. & George's Farms, Inc.</u>	
A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com
Philip Hixon	phixon@mhla-law.com
Craig A. Merkes	cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC	
Sherry P. Bartley	sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	
<u>Counsel for Peterson Farms, Inc.</u>	
John Elrod	jelrod@cwlaw.com
Vicki Bronson	vbronson@cwlaw.com
P. Joshua Wisley	jwisley@cwlaw.com
Bruce W. Freeman	bfreeman@cwlaw.com
D. Richard Funk	rfunk@cwlaw.com
CONNER & WINTERS, LLP	
<u>Counsel for Simmons Foods, Inc.</u>	
Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Thomas C. Green	tcgreen@sidley.com
Gordon D. Todd	gtodd@sidley.com

SIDLEY, AUSTIN, BROWN & WOOD LLP	
Robert W. George	robert.george@tyson.com
L. Bryan Burns	bryan.burns@tyson.com
Timothy T. Jones	tim.jones@tyson.com
TYSON FOODS, INC	
Michael R. Bond	michael.bond@kutakrock.com
Erin W. Thompson	erin.thompson@kutakrock.com
Dustin R. Darst	dustin.darst@kutakrock.com
KUTAK ROCK, LLP	
<u>Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.</u>	
R. Thomas Lay	rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES	
Frank M. Evans, III	fevans@lathropgage.com
Jennifer Stockton Griffin	jgriffin@lathropgage.com
David Gregory Brown	
LATHROP & GAGE LC	
<u>Counsel for Willow Brook Foods, Inc.</u>	
Robin S Conrad	rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER	
Gary S Chilton	gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC	
<u>Counsel for US Chamber of Commerce and American Tort Reform Association</u>	
D. Kenyon Williams, Jr.	kwilliams@hallestill.com
Michael D. Graves	mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON	
<u>Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.</u>	
Richard Ford	richard.ford@crowedunlevy.com
LeAnne Burnett	leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY	
<u>Counsel for Oklahoma Farm Bureau, Inc.</u>	
Kendra Akin Jones, Assistant Attorney General	Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General	Charles.Moulton@arkansasag.gov

<u>Counsel for State of Arkansas and Arkansas National Resources Commission</u>	
Mark Richard Mullins	richard.mullins@mcafeetaft.com
MCAFEE & TAFT	
<u>Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen</u>	
Mia Vahlberg	mvahlberg@gablelaw.com
GABLE GOTWALS	
James T. Banks	jtbanks@hhlaw.com
Adam J. Siegel	ajsiegel@hhlaw.com
HOGAN & HARTSON, LLP	
<u>Counsel for National Chicken Council; U.S. Poultry and Egg Association & National Turkey Federation</u>	
John D. Russell	jrussell@fellerssnider.com
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC	
William A. Waddell, Jr.	waddell@fec.net
David E. Choate	dchoate@fec.net
FRIDAY, ELDREDGE & CLARK, LLP	
<u>Counsel for Arkansas Farm Bureau Federation</u>	
Barry Greg Reynolds	reynolds@titushillis.com
Jessica E. Rainey	jrainey@titushillis.com
TITUS, HILLIS, REYNOLDS, LOVE, DICKMAN & MCCALMON	
Nikaa Baugh Jordan	njordan@lightfootlaw.com
William S. Cox, III	wcox@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC	
<u>Counsel for American Farm Bureau and National Cattlemen's Beef Association</u>	
Duane L. Berlin	dberlin@levberlin.com
LEV & BERLIN PC	
<u>Counsel for Council of American Survey Research Organizations & American Association for Public Opinion Research</u>	

Also on this 2nd day of June, 2009 I mailed a copy of the above and foregoing pleading
to:

Thomas C Green -- via email: tcgreen@sidley.com
Sidley, Austin, Brown & Wood LLP

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center St, Ste 200
Little Rock, AR 72201-2610

Steven B. Randall
58185 County Rd 658
Kansas, Ok 74347

Cary Silverman -- via email: csilverman@shb.com
Victor E Schwartz
Shook Hardy & Bacon LLP (Washington DC)

/s/ Richard T. Garren
Richard T. Garren